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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

KINSAKU AOYAGI et al., Plaintiffs and Appellants, v. MANCINI & ASSOCIATES et al., Defendants and Respondents.	B179461 (Los Angeles County Super. Ct. No. LC056910)

APPEAL from a judgment of the Superior Court of Los Angeles County. Stephen Petersen, Judge. Affirmed.

Law Offices of Jack Atnip III, Jack Atnip III; McDonald & Bryan and Phyllis J. Bryan for Plaintiffs and Appellants.

Lacey, Dunn & Do, Kevin S. Lacey, Chau T. Do and Catherine L. Sekely for Defendants and Respondents.

We affirm the entry of summary judgment against Kinsaku and Asako Aoyagi (appellants). Notwithstanding the strong policy in favor of deciding cases on the merits, the trial court acted within its discretion in finding appellants' untimely opposition to summary judgment and opposing separate statement failed to identify disputed facts. The substantial procedural deficiencies in the opposing separate statement rendered the substance of the statement incomprehensible. Appellants' abandoned this issue on appeal, failing to raise it in their opening brief and failing to file a reply brief.

FACTUAL AND PROCEDURAL BACKGROUND

Appellants' son was killed in a tragic car accident. He was a passenger in a vehicle manufactured by Ford Motor Company (Ford) and equipped with tires manufactured by Bridgestone Firestone, Inc. (Bridgestone). The Aoyagis live in Japan and do not speak English. With assistance from a Japanese attorney, Go Kondo, they hired Mancini & Gallagher to represent them in a lawsuit against Ford, Bridgestone, and related companies.[1]

There is no dispute that Marcus Mancini and Maryanne Gallagher represented the Aoyagis in the underlying litigation against Ford and Bridgestone. The parties dispute whether another attorney, David Cohn, an associate at Mancini & Gallagher also represented the Aoyagis. (Mancini & Gallagher, Marcus Mancini, Maryanne Gallagher, and David Cohn are referred to collectively as Mancini or respondents.) Mancini dismissed the underlying litigation with prejudice and received no recovery from either Ford or Bridgestone.[2]

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[1] The driver and owner of the vehicle were also sued, but it appears those lawsuits were pursued in Japan.

[2] The Aoyagis state that they never consented to the dismissal. In his deposition, Kondo stated "I finally told him [Marcus Mancini] that the Aoyagis finally agreed to dismiss the case."

The Aoyagis then sued Mancini for malpractice, fraud, and breach of fiduciary duty.[3] The trial court sustained respondents' demurrers to the causes of action for fraud and breach of fiduciary duty. The trial court entered summary judgment in favor of Mancini on the malpractice cause of action. The court provided two independent grounds for its ruling: (1) the Aoyagis' untimely motions failed to comply with Code of Civil Procedure section 437c, subdivision (b)(3) and California Rules of Court, rule 342(h), and (2) the Aoyagis failed to raise any triable issue of material fact with respect to, among other things, whether Mancini caused the Aoyagis damage. This appeal followed.

DISCUSSION

I. Mancini's Motion Shifted the Burden to Appellants With Respect to the Element of Causation

Relying solely on *Biljac Associates v. First Interstate Bank* (1990) 218 Cal.App.3d 1410 (*Biljac*), appellants argue they were not required to present any evidence because Mancini's motion never showed it could negate an element of their malpractice cause of action. As appellants argue, *Biljac* held that a defendant moving for summary judgment must conclusively negate an element of plaintiff's cause of action. Quoting *Barnes v Blue Haven Pools* (1969) 1 Cal.App.3d 123, 127, *Biljac* instructs: " 'There is nothing in the statue [section 437c] which lessens the burden of the moving party simply because at the trial the resisting party would have the burden of proof on the issue on which the summary judgment is sought to be predicated.' " (*Biljac*, *supra*, 218 Cal.App.3d at p. 1421.)

Biljac is no longer good law as it was based on a statute that is no longer effective. Our high court made this clear in *Aguilar v. Atlantic Richfield, Co.* (2001)

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[3] Although the initial complaints alleged additional causes of action, the operative pleading, alleges causes of action for malpractice, fraud, and breach of fiduciary duty.

25 Cal.4th 826, a case ignored by appellants. Under the current statute, the defendant moving for summary judgment "bears the burden of persuasion that 'one or more elements of' the 'cause of action' in question 'cannot be established,' or that 'there is a complete defense' thereto." (*Aguilar v. Atlantic Richfield, Co., supra*, 25 Cal.4th at p. 850, quoting former Code of Civil Procedure section 437c, subd. (o)(2).) If the party moving for summary judgment carries its initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact, the burden shifts to the party opposing summary judgment to show a triable issue of material fact. (*Ibid*.)

Summary judgment law no longer requires "a defendant moving for summary judgment to conclusively negate an element of the plaintiff's cause of action." (*Aguilar v. Atlantic Richfield, Co., supra*, 25 Cal.4th at p. 853.) "The defendant has shown that the plaintiff cannot establish at least one element of the cause of action by showing that the plaintiff does not possess, and cannot reasonably obtain, needed evidence. . . ." (*Id.* at p. 854.) The *Aguilar* court expressly disapproved of *Barnes*, the case relied on in *Biljac* because *Barnes* was "no longer vital inasmuch as such law as it stands now is materially different." (*Id.* at p. 855, fn. 25.)

Appellants have not shown any error in the finding that Mancini carried its burden of persuasion. Not only do they fail to recognize the correct legal standard, but they provide no citation to facts in the record supporting their contention that Mancini failed to meet its burden. " ' "It is the duty of a party to support the arguments in its briefs by appropriate reference to the record, which includes providing exact page citations." ' " (*Grant-Burton v. Covenant Care, Inc.* (2002) 99 Cal.App.4th 1361, 1379.) In another portion of their brief, appellants argue "the court erroneously found the absence of causation based on hearsay." Appellants, however, fail to identify the evidence or to explain why they believe the court incorrectly determined it to be hearsay.

Mancini provided sufficient evidence to carry its burden that appellants do "not possess, and cannot reasonably obtain, needed evidence. . . ." (*Aguilar, supra,* 25

Cal.4th at p. 854) that Ford or Bridgestone caused the accident. Witnesses to the traffic collision and the traffic collision report indicated that the driver was speeding. Appellants' son was not wearing a seatbelt. The police determined the driver was at fault for the collision. An analysis of the Firestone tire indicated that a fibrous plug in the tire contributed to the collision. The tire was then destroyed. Mancini provided evidence that Kondo testified "the Aoyagis finally agreed to dismiss the case" and he conveyed the agreement to Mancini.

Appellants' discovery responses indicated that additional investigation by Mancini would have revealed: "Names of other attorneys litigating hundreds of Ford Explorer and Bridgestone/Firestone defect cases; similar occurrence evidence from dozens of cases; court records, files, and case materials relating to Ford Explorer and Bridgestone/Firestone tire litigation nationwide over more than a decade; physical evidence of cases with similar circumstances to the instant case; expert findings relating to Ford Explore and Bridgestone/Firestone tire defects; expert deposition testimony; corporate personnel deposition testimony from Ford and Bridgestone/Firestone relating to design defects, manufacturing defects of Ford Explores and Bridgestone/Firestone tires, as well as testimonial and documentary evidence of potential corporate concealment and cover-ups relating to same." None of this evidence identified in the interrogatory response indicates that either the Ford vehicle or Bridgestone tire caused the accident that tragically killed appellants' son. Thus, the discovery response indicates that Mancini would not have discovered evidence that Ford or Bridgestone caused the particular accident that harmed appellants' son.

II. The Trial Court Acted Within Its Discretion in Awarding Summary Judgment Based on the Aoyagis' Deficient Opposition

Having concluded that the burden shifted to appellants, the next question is whether appellants satisfied their burden of raising a triable issue of material fact. The party opposing a motion for summary judgment must include a separate statement that responds to each material fact raised by the moving party and indicates whether each

fact is disputed or undisputed. (*Parkview Villas Assn., Inc. v. State Farm Fire & Casualty Co.* (2005) 133 Cal.App.4th 1197, 1209 (*Parkview*).) Pursuant to California Rules of Court, rule 342, the opposing party's separate statement must "use a two-column format, repeating in the first column each material fact claimed by the moving party to be undisputed followed by the evidence advanced by the moving party to establish that fact and then in the second column, directly opposite the recitation of each of the moving party's undisputed facts, stating whether the fact is 'disputed' or 'undisputed.' " (*Id.* at p. 1210.) The purpose of the moving party's separate statement and the opposing party's separate statement is to give the parties notice of the material facts and to permit the trial court to identify the facts that are truly undisputed. (*Id.* at p. 1210.) Where the separate statement does not identify which facts are disputed, courts have granted summary judgment in favor of the moving party. (*Id.* at p. 1213, 1214.)

We review for abuse of discretion the decision to grant a motion for summary judgment because the opposing party failed to comply with the requirements for a separate statement. (*Parkview*, *supra*, 133 Cal.App.4th at p. 1208.) A trial court's discretion, however, is not unlimited. Where a separate statement indicates which material facts are disputed and includes "at least general references to the evidence supporting its position" the trial court does not have discretion to enter a judgment "solely as a result of that party's failure to explain the nature of the dispute and to provide sufficiently specific citations to the evidence supporting its position." (*Id.* at p. 1215.)

The Aoyagis' separate statement is difficult to understand. For example, it indicates that "Proffered Fact Nos. 5, 36, 67, 98 and 129" are "Immaterial and Disputed on the basis that it is pure speculation and construction of incorporated hearsay." For "Proffered Fact Nos. 31, 62, 93, 124, and 155" the only description is "immaterial." Proffered Fact Nos. 30, 61, 92, 123, and 154 are simply "disputed," but not only are these facts not identified, but the alleged contrary facts also are not identified.

This description in the opposing separate statement does not identify a dispute or explain the subject of the evidentiary challenge. It does not include the facts that the Aoyagis are purporting to dispute. The Aoyagis have taken Mancini's 155 facts and reduced them to 31 facts. This reduction ignores the procedural requirements and fails to give notice of the disputed facts either to the opposing party or to the court. Notwithstanding the strong policy for deciding cases on the merits (*Parkview, supra*, 133 Cal.App.4th at p. 1202), the trial court did not abuse its discretion in granting summary judgment where the opposing separate statement fails to identify the material facts in dispute.

Affirmance of the summary judgment is required for a separate independent reason. In their opening brief, the Aoyagis fail to even mention that one ground for the trial court's ruling was its refusal to consider the opposition papers. The Aoyagis do not argue that this ruling constituted an abuse of discretion. They provide no legal analysis identifying why such conduct would be an abuse of discretion. While Mancini discusses this issue in its respondent's brief, the Aoyagis filed no reply. Appellants have abandoned this issue on appeal by failing to raise it or support it. (See *Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466.)[4]

III. Demurrer

Finally, appellants argue that the court erred in sustaining demurrers to their causes of action for breach of fiduciary duty and fraud. According to appellants, "[t]he failure to communicate their ongoing and gross disregard, as well as the dramatic posture of the litigation, is clearly a form of non-disclosure (i.e. fraud)." Appellants' causes of action for fraud and breach of fiduciary duty are based on the same conduct as the legal malpractice cause of action.

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[4] Given these findings we need not consider appellants' remaining arguments or Cohn's separate motion for summary judgment.

The contention that the demurrer was erroneously sustained is rendered moot by the entry of summary judgment on the malpractice cause of action. (*Thompson v. Halvonik* (1995) 36 Cal.App.4th 657, 664.) Causation is an element of breach of fiduciary duty and similarly justifiable reliance resulting in damages are elements of fraud. (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc*. (1998) 68 Cal.App.4th 445, 483; *Wilkins v. National Broadcasting Co.* (1999) 71 Cal.App.4th 1066, 1081.) In this case, the summary judgment reflects that the Aoyagis cannot establish these elements and the issues with respect to the demurrers are moot.

DISPOSITION

The judgment is affirmed. Respondents are entitled to costs.

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COOPER, P.J.

We concur:

RUBIN, J.

BOLAND, J.